



JOINT GUIDANCE MEMORANDUM

DIVISION OF ENFORCEMENT AND WATER DIVISION

P.O.BOX 1105

Richmond, VA 23218

SUBJECT: Guidance Memorandum No. 09-2009 – Resolving Unpermitted Impacts to Surface Waters with Enforcement Actions

TO: Regional Directors, Regional VWPP/Water Permit Managers, VWPP Staff, Enforcement Staff

FROM: Ellen Gilinsky, Ph.D., Director, Water Division

Melanie D. Davenport, Director, Division of Enforcement

DATE: July 28, 2009

SUMMARY:

In the past, DEQ has sometimes achieved compliance for unpermitted impacts to surface waters by conducting an enforcement action against the responsible party and then engaging in the permit process to authorize the unpermitted activity. This guidance establishes the use of enforcement actions in lieu of permits for unpermitted impacts to surface waters involving environmental harm or ongoing non-compliance. When additional surface water impacts are proposed for a site involving previous unpermitted impacts to surface waters, this guidance requires an independent utility analysis to determine the cumulative impact of the project. This guidance also establishes procedures for using general and individual permits for projects involving previous unpermitted impacts.

Electronic Copy:

An electronic copy of this guidance in PDF format is available for staff internally on DEQNET, and for the general public on DEQ's website at: <http://www.deq.virginia.gov/waterguidance/>.

Contact Information:

Please contact David Davis, Office of Wetlands and Water Protection, (804) 698-4105 or dldavis@deq.virginia.gov if there are any questions about this guidance.

Disclaimer:

This document is provided as guidance and, as such, sets forth standard operating procedures for the agency. However, it does not mandate any particular method nor does it prohibit any particular method for the analysis of data, establishment of a wasteload allocation, or establishment of a permit limit. If alternative proposals are made, such proposals should be reviewed and accepted or denied based on their technical adequacy and compliance with appropriate laws and regulations.

I. Purpose

This guidance establishes that the practice of “after-the-fact”¹ permitting is unacceptable for cases with major unpermitted impacts and major exceedances, and describes the process for addressing those unpermitted impacts with a collaborative effort between enforcement and Virginia Water Protection Permit (VWPP) Program staff. This guidance does not apply to permitting and enforcement of unpermitted impacts for Virginia Department of Transportation (VDOT) projects², Emergency VWPPs³, or issuance of State Program General Permits (SPGP)⁴.

II. Background and Authority

Enforcement Actions versus After-the-Fact Permits for Unpermitted Impacts

Previously, DEQ achieved compliance for certain unpermitted impacts by conducting an enforcement action against the responsible party and then engaging in the permit process to authorize the unpermitted activity. Or in other situations, there was no enforcement action and the permit was issued after the impact was taken. The resulting permit was called an “after-the-fact” permit. After-the-fact permitting legitimizes unpermitted activities and circumvents the required regulatory review and oversight to avoid and minimize impacts. Therefore, rather than issuing after-the-fact permits for major unpermitted impacts, it is more appropriate and more in-line with the regulatory goals of the VWPP Program for DEQ to conduct enforcement actions for unpermitted impacts. Regional VWPP staff will use standard permitting methodologies to review the avoidance/minimization and compensation in collaboration with enforcement staff during the development of injunctive relief. This guidance does not change the current practice of VWPP staff evaluating permit applications for new impacts on sites where previous unpermitted impacts have occurred.

An enforcement action is better suited for addressing unpermitted impacts which result in environmental harm, as compared to the permit process for the following reasons:

- Certain enforcement actions can provide additional scrutiny by being subject to public comment where a general permit is not.
- Enforcement staff has more flexibility to apply greater mitigation ratios than do permitting staff potentially serving as deterrence to future noncompliance. See, [Wetland Compensation Ratios. Guidance Memorandum 00-2003](#). Feb. 1, 2000.
- Enforcement actions remove the economic incentive for non-compliance by capturing any

¹“After-the-fact” permit is a widely used term to describe a permit issued after unpermitted impacts have commenced.

² See Memorandum of Understanding between VDEQ and VDOT for Virginia Water Protection Permit Process Streamlining, November 2007.

³ See 9 VAC 25-210-80 D 1-2

⁴ See 07-SPGP-01 at <http://www.nao.usace.army.mil/technical%20services/Regulatory%20branch/RBregional.asp>

benefit of noncompliance that may exist.

- Enforcement actions can require restoration of unpermitted impacts in a legally binding action.

Regulation of State Waters

State Water Control Law ([§§ 62.1-44.15 and 62.1-44.15:20-23](#)) gives DEQ the authority to regulate excavating, filling and dumping, and activities that “alter the physical, chemical, or biological properties of state waters and make them detrimental to the public health, animal or aquatic life, or to the uses of such waters for domestic or industrial consumption, or for recreation, or for other uses unless authorized by a certificate issued by the Board.”

The Code of Virginia [62.1-44.15\(8d\)](#) authorizing the use of Consent Orders, states:

“With the consent of any owner who has violated or failed, neglected or refused to obey any regulation or order of the Board, any condition of a permit or any provision of this chapter, the Board may provide, in an order issued by the Board against such person, for the payment of civil charges for past violations in specific sums not to exceed the limit specified in [§ 62.1-44.32](#) (a).”

The Code of Virginia ([§10.1-1186](#)) authorizing enforcement activities, states:

“Notwithstanding any other provision of law and to the extent consistent with federal requirements, following a proceeding as provided in [§ 2.2-4019](#), issue special orders to any person to comply with: (i) the provisions of any law administered by the Boards, the Director or the Department, (ii) any condition of a permit or a certification, (iii) any regulations of the Boards, or (iv) any case decision, as defined in [§ 2.2-4001](#), of the Boards or Director.”

The VWPP Program Regulation (9 VAC 25-210-240) identifies DEQ enforcement staff as the lead for unpermitted surface water impacts:

“The board may enforce the provisions of this chapter utilizing all applicable procedures under the law and [§10.1-1186](#) of the Code of Virginia.”

III. Definitions

The definitions in [9 VAC 25-210-10](#) of the VWPP Program Regulation and VA Code [§ 2.2-4001](#) apply to this guidance. The following definitions are especially pertinent to this guidance:

Enforcement action: means any action taken by the Division of Enforcement, including but not limited to a Consent Special Order, a Special Order issued after a formal or informal hearing, a Letter of Agreement, or a referral to the Office of the Attorney General. The term enforcement action does not include dereferral of a case.

Independent utility: A test to determine what constitutes a single and complete project. A project is considered to have independent utility if it “would be constructed absent the construction of other projects in the project area. Portions of a phased development project that depend upon other phases of the development project do not have independent utility. Portions of a phased development project that would be constructed even if the other phases are not built can be considered as separate single complete projects with independent utility. The independent utility test includes physical features (infrastructure) and economic factors.”⁵

Major exceedance: Permitted project where unauthorized activity exceeds minor modification/notice of planned change thresholds (For specific thresholds, see [9 VAC 25-210-180](#), [9 VAC 25-660-80](#), [9 VAC 25-670-80](#), [9 VAC 25-680-809](#), [VAC 25-690-80](#)). Major exceedance can be more or less than the thresholds, depending on additional factors, such as harm to human health or the environment and the effects on the statutory and/or regulatory purpose.

Major unpermitted impacts: Applies to projects where no permit was obtained in advance and unpermitted impacts require compensatory mitigation, (e.g. typically unpermitted impacts exceeding 0.10 acre of wetland or open water or 300 linear feet of streambed impact). Major Unpermitted Impacts could be more or less than the thresholds indicated depending on additional factors, such as harm to human health or the environment and the effects on the regulatory program.

Minor exceedance: Permitted project where unauthorized activity is equal to or below minor modification/notice of planned change thresholds (For specific thresholds, [9 VAC 25-210-180](#), [9 VAC 25-660-80](#), [9 VAC 25-670-80](#), [9 VAC 25-680-809](#), [VAC 25-690-80](#)). Minor exceedance can be more or less than the thresholds, depending on additional factors, such as harm to human health or the environment and the effects on the regulatory program.

Minor unpermitted impacts: Applies to projects where no permit was obtained in advance and unpermitted impacts do not require compensatory mitigation, when permitted, (e.g. typically unpermitted impacts less than 0.10 acre of wetland or open water or 300 linear feet of stream bed and no special resources such as threatened and endangered species).

No net loss: Compensating for project impacts sufficient to replace existing wetland acreage and functions in all surface waters ([9 VAC 25-210-116](#)).

Single and complete project: The total project proposed or accomplished by one owner/developer or partnership or other association of owners/developers which also has independent utility. A project may be considered to be “single and complete” if it can be

⁵ Definition is from USACE & DEQ, June 19, 2007, [Federal Public Notice: Subdivision Recommendations](#). See also [Fed. Reg.](#) 2020, 2094 (Jan. 15, 2002). A single and complete project was defined by *Crutchfield v. County of Hanover*, 325 F. 3d 211 (4th Cir. 2003) as the total project proposed or accomplished by a single entity.

constructed independent of any reliance on subsequent or previous permit authorizations (i.e., activities preceding or following those under the current authorization).⁶

Significant alteration or degradation of existing wetland acreage or function: Human-induced activities that cause either a diminution of the areal extent of the existing wetland or cause a change in wetland community type resulting in the loss or more than minimal degradation of its existing ecological functions (9 VAC 25-210-10).

IV. Resolving Unpermitted Impacts to Surface Waters

VWPP staff should use current guidance and point systems to determine if unpermitted surface water impacts should be referred to enforcement or addressed independently by VWPP staff. In general, unpermitted impacts causing significant adverse impact to the environment (e.g. major unpermitted impacts and major exceedances) or on-going non-compliance are issued a Notice of Violation (NOV). Therefore, the case is referred to the DEQ's Division of Enforcement for resolution. When it is determined that an enforcement action is warranted to resolve unpermitted impacts, enforcement staff and permitting staff should collaborate to ensure that all of DEQ's interests are addressed in the injunctive relief section of the enforcement action. When an enforcement action is not warranted, VWPP staff should follow standard compliance procedures and additional permitting procedures provided in this guidance.

Developing Enforcement Actions

For the majority of cases, Regional VWPP staff and enforcement staff will collaborate to review the avoidance/minimization and restoration analysis necessary for the enforcement action (injunctive relief). Regional VWPP staff and enforcement staff will continue to collaborate to document special resources (e.g. Federal or State listed threatened and endangered species, impaired waters, waters with anadromous fish). VWPP Regional Office staff should collaborate with the VWPP Central Office staff to review the avoidance/minimization and restoration analysis for cases involving topics of particular concern or cases of first impression (e.g. precedent setting cases or new issues). The VWPP regional staff will use standard permitting methodologies for assessing avoidance, minimization, and compensation of unpermitted impacts as a starting point. This includes using the standard ratios for compensatory mitigations (e.g. 2:1 for Palustrine Forested Wetlands). Where the avoidance and minimization requirements have been circumvented, a higher mitigation ratio may be justified to ensure a no net loss of function in all surface waters. Regional enforcement staff and VWPP staff should calculate additional compensation requirements necessary in order to account for temporal and/functional loss (e.g. conversion from palustrine forested wetland to scrub-shrub wetland or loss of unique or critical habitats). Enforcement will also develop the civil charge, which at a minimum, must capture the economic benefit of noncompliance. The enforcement action may contain long term monitoring requirements that in the past were captured in the after-the-fact permit; this change establishes noncompliance as a breach of the Consent Order which may be referred to the

⁶ Id.

Attorney General's Office.

The United States Army Corps of Engineers (USACE) can issue a Nationwide Permit 32 (NWP 32) for unpermitted impacts resolved through the USACE. DEQ has provided 401 certification for the NWP 32. Therefore, DEQ can forego mitigation requirements and enforcement action if DEQ determines that no further resolution is necessary. However, a decision by the USACE to issue a permit or to forego enforcement action is not determinative of the DEQ's response. DEQ can still issue an enforcement action, such as a consent order and penalty. VWPP staff should use the 4-point threshold and best professional judgment to determine if the unpermitted impacts should be referred to enforcement.

*Unpermitted Impacts **not** Resolved Using an Enforcement Action*

There are limited situations where an unpermitted impact will not be resolved using an enforcement action. They include:

- the case is not referred to enforcement (e.g. minor unpermitted impacts and minor exceedance);
- enforcement defers the case⁷;
- the unpermitted impact did not require a VWP permit; or
- regional or agency leadership decision to not pursue enforcement.

Where unpermitted impacts do not create a significant alteration or degradation of surface water function nor warrant referral to enforcement, VWPP staff should review the case closely to ensure no additional factors such as presence of threatened and endangered species, compliance history, or sedimentation from improper erosion and sediment control would elevate the unpermitted impact to a higher point level and warrant referral to enforcement.

Where the Division of Enforcement does not pursue an enforcement action, enforcement staff must complete a case closure memo to provide a reasoned analysis for the decision. The memo will be maintained in enforcement files and copied to the permit file if one exists.

If the project's cumulative impacts would not have required a permit (e.g. no surface water impacts or the activity is excluded from VWPP Regulation, or the USACE issues a permit with 401 certification) no enforcement action is required. The case may be processed by VWPP staff after the responsible party submits a Joint Permit Application (JPA), typically with a "no permit required" letter.

Unpermitted impacts that would have required a permit and, which are not referred to enforcement (less than 4 points⁸) or de-referred using a case closure memo, can be addressed

⁷ For example, unauthorized impacts [to isolated wetlands of minimal ecological value](#) may not warrant a Consent Order but must be reviewed on a case-by-case basis.

⁸ The [DEQ Enforcement Manual](#) (12/1/1999) establishes procedures for referral of cases to enforcement for those facilities that accumulate 4 or more points during the prior 6-month period.

through compliance and permitting procedures (e.g. through a corrective action plan). If VWPP staff determines that mitigation is required, they can require mitigation by issuing an after-the-fact permit. If no compensatory mitigation is necessary no permit needs to be issued for the project. The impact amounts should be documented in the VWP Comprehensive Environmental Data System (CEDS) compliance module (when available).

A future permit application that proposes additional impacts must account for the cumulative impact of the project by determining if it is a single and complete project. Where the cumulative impacts meet the VWP general permit requirements, but concerns for water quality and the aquatic environment would benefit from the increased review and analysis, VWPP staff may require a VWP individual permit. See, [9 VAC 25-210-130 \(B\)](#).

For all VWP permits, applicants use the JPA process to apply for future impacts, regardless of past activity on the site. The JPA requires an applicant to report any previous impacts to state waters. Applicants for VWP permits must identify all impacts, permanent and temporary; demonstrate avoidance and minimization to the maximum extent practicable (See, [9 VAC 25-210-80 \(B\) \(1\)](#)); and demonstrate that the project is the least environmentally damaging practicable alternative (See, [9 VAC 25-210-115](#)).

Authorizing Additional Impacts

If the responsible party chooses to proceed with a project that would result in additional surface water impacts, enforcement staff should address all impacts occurring prior to discovery of the violation and VWPP staff will work to process a permit for the proposed impacts. Because these impacts are proposed, not already taken, permitting timelines set forth in the Code apply. VWPP staff will evaluate the proposed project to determine if all unpermitted impacts and proposed additional permitted impacts are a single and complete project. This is done through an independent utility analysis⁹.

Where unpermitted impacts occurred for a project, any future permit application to complete the project must consider the cumulative impacts to determine if thresholds for compensation or an individual permit are reached. Unpermitted impacts which have already been (or will be) restored are not considered toward compensation or permit thresholds.

Some examples where additional impacts are often proposed to complete a project include:

- a completed dam with a proposed water withdrawal;
- a partially installed culvert in a stream associated with an incomplete road crossing;
- a complete culvert and road crossing that leads to a building site with additional proposed impacts; or
- a partial commercial and/or residential development with a common scheme.

⁹ An independent utility analysis is the reasoned analysis, documented in the project file, for making the determination that the proposed project is or is not a single and complete project.

Where the applicant or permittee has been non-compliant (e.g. the proposed project is associated with previous unpermitted impacts) and VWPP staff determines that concerns for water quality and the aquatic environment would benefit from the increased review and analysis, VWPP staff may require a VWP individual permit or major modification for additional impacts of an ongoing project, even if the proposed impacts qualify for a general permit. *See, [9 VAC 25-210-130 \(B\) \(2\)](#)*. The individual permit process allows increased review and analysis and is often appropriate to address concerns for water quality and the aquatic environment when an unpermitted activity has limited the opportunity for achieving adequate avoidance and minimization.

In cases where a responsible party submits a JPA for an after-the-fact permit and the unpermitted impact meets the 4-point threshold, it may not be possible for the VWPP staff to deem an application complete when the permanent and temporary impacts identified in the JPA are unknown or speculative (*See, [9 VAC 25-210-80 \(B\)\(1\)](#)*). The responsible party can not accurately identify total impacts or develop a compensatory mitigation plan because the final impacts are unknown until resolution of the enforcement action (e.g. how much on-site restoration will be required). Furthermore, the responsible party may not be able to submit a complete application if he/she fails to demonstrate that measures were taken to avoid and minimize impacts to surface waters to the maximum extent practicable and that the unauthorized project is the least damaging practicable alternative (*See [9 VAC 25-210-115](#)*).¹⁰

Tracking

VWPP staff and enforcement staff should use CEDS and other necessary databases to record all unpermitted impacts and compensation.

V. Examples

Permitting and enforcement decisions are often case-specific. Four examples are provided below to provide some typical case scenarios.

Unpermitted impacts part of an ongoing project

A responsible party, acting without a permit, installs a parking lot causing an unpermitted impact of 0.25-acres of forested wetland. The impact is addressed through an enforcement action requiring the purchase of 0.75 credits at a wetland mitigation bank and a \$13,000.00 civil charge. The responsible party then submits a JPA for an additional 0.09-acre impact of forested wetland on the same site. Staff evaluates the project and determines the previous impact and the proposed impact are for a single and complete project. Staff follows the general permit process. While processing the permit application, staff evaluates the whole project's impact (0.34-acre

¹⁰ *See, 9 VAC 25-210-230* for additional authority for VWP permit denial.

impact) on water quality and aquatic life. This is necessary because DEQ has lost flexibility to utilize avoidance and minimization to reduce impacts. DEQ determines that even the 0.34-acre impact causes minimal degradation to surface water function and approves the proposed impacts under a general permit. DEQ requires 0.18 acres of mitigation (in-line with the standard 2:1 ratio) for the additional 0.09-acre impact. The 0.25 would be recorded in the compliance module or other database. In CEDS you would record the permitted impact as 0.09 acre impact and show mitigation.

Two discrete single and complete projects: one unpermitted, one authorized

While building a single family home in 2001, a responsible party impacts 0.40 acres of forested wetland without a permit. The impact is resolved through an enforcement action including a civil charge and compensation (3:1). In 2008, the regulated party submits a JPA for an additional impact to 250 linear feet of stream on the property. DEQ determines that the proposed impact and the previous impact are not a “single and complete project (e.g. the second impact might have independent utility if it is for a road crossing for a barn, a utility line for a second home, etc.). DEQ documents this conclusion in the file with the independent utility analysis and proceeds with permit issuance. Permitting staff determines that the proposed impact does not create concerns for water quality and the aquatic environment and hence an individual permit is not required. DEQ processes the permit using general permit procedures and in accordance with current guidance and stream methodology the permit does not require compensation because the stream impact is less than 300 lf.

Permit modification

A permittee exceeds authorized impacts by 15 linear feet of stream. The permittee self-reports. Based on the point assessment criteria, the permit exceedance does not warrant the issuance of a NOV and referral to enforcement. VWPP staff process a permit minor modification. (See, 9 VAC 25-210-180 (F) (8)).

Minimal unpermitted impacts

VWP staff refers an unpermitted 0.07-acre wetland impact to DEQ enforcement. Enforcement chooses not to pursue an enforcement action or a letter of agreement, because the impact is found to present minimal environmental harm. Enforcement completes a case closure memo and provides a reasoned analysis for the decision. The case closure memo serves as DEQ documentation of the activity and no further permit or enforcement action is necessary. The responsible party proceeds to apply for an additional 1.6-acre impact to wetlands and 100 linear feet of streambed. The VWP regional permitting staff evaluates the application and determines the single and complete project entails 1.67-acre of wetland impact and 100 lf of streambed impact when accounting for the previous unpermitted impacts. There are no on-site opportunities for compensation, and water quality concerns exist due to potential erosion downstream. VWP regional staff proceeds with the VWP individual permit process. A general

permit is not warranted for this case because there are additional concerns for water quality.

In this example, if the responsible party is not seeking additional impacts VWPP staff should document the 0.07-acre impact in the CEDS compliance module.

VI. Conclusion

Unpermitted impacts can be resolved using a myriad of tools, such as warning letters, enforcement actions, or permit modifications. VWPP staff can avoid legitimizing unpermitted activities, which may result in a significant alteration or degradation of existing wetland acreage and loss of function in all surface waters by referring the case to DEQ's Division of Enforcement. Unpermitted activity that earns four points, as calculated under current guidance, must be referred to the regional enforcement staff for evaluation and resolution. The standard permitting process should not be used when four or more points are assessed.

When VWPP staff determines that the unpermitted impacts require an individual permit, such as when the cumulative impacts meet individual permit thresholds or where public comment is needed, enforcement is more than likely warranted. Keep in mind that VWPP staff may require an individual permit in any situation where there were previous unpermitted impacts. Where the VWPP and Division of Enforcement staff agree that an enforcement action is not warranted, VWPP staff can seek resolution through compliance and permitting in a manner that is consistent across all regions.

VWPP staff and DEQ enforcement staff should continue to collaborate to resolve unpermitted impacts to surface waters in the Commonwealth by deterring future noncompliance and working to prevent significant adverse impacts to the environment.